No. 06-643

IN THE

Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF FORMER JUDGES OF THE UNITED STATES COURTS OF APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are former judges of the United States Courts of Appeals.[2]

Arlin M. Adams was appointed to the United States Court of Appeals for the Third Circuit in 1969 and served on that court until 1987. Mr. Adams served on the board of the Federal Judicial Center and as a member of the Judicial Nominating Commission. Both the Arlin M. Adams Center for Law and Society at Susquehanna University and the Arlin M. Adams Professorship on Constitutional Law at the University of Pennsylvania School of Law were established in his honor. Mr. Adams is a litigator and appellate advocate in private practice.

John J. Gibbons graduated from Harvard Law School in 1950, and was in private practice until appointed to the United States Court of Appeals for the Third Circuit in 1970. During his twenty years on that court, he published numerous opinions and served as Chief Judge from 1987 to

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[1] Pursuant to Supreme Court Rule 37.6, the *amici curiae* certify that no counsel for a party authored the brief in whole or in part, and that no person or entity, other than the *amici curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such letters of consent have been filed with the Clerk of this Court. Sup. Ct. Rule 37.2(a).

[2] Care has been taken to avoid using the title "Judge" in these papers to designate a former judge "unless the designation is necessary to describe accurately the person's status at a time pertinent to the lawsuit." *See Boumediene v. Bush*, No. 05-5062, Order Denying Motion for Leave to File Brief Amici Curiae at 3 (D.C. Cir. Dec. 29, 2006). For the reasons set forth in the statement by Circuit Judge Rogers, *amici* submit that the Order improperly applied Advisory Opinion No. 72, Committee on Codes of Conduct, Judicial Conference of the United States. The judicial service of *amici*, three of whom served as Chief Judge, is no secret to the members of this Court and is highly pertinent to the sole issue to which they speak in this brief: the importance of oral argument to appellate judges.

1990. Upon his retirement, he was a professor of constitutional law at Seton Hall University Law School then returned to private practice in 1997. In 2004, Mr. Gibbons successfully argued before this Court for the right of Guantanamo detainees to challenge their detention in the courts of the United States. *See Rasel v. Bush*, 542 U.S. 466 (2004).

Shirley M. Hufstedler was a private litigator in private practice for ten years and Special Legal Consultant to the Attorney General of California for one year before she was appointed judge of the Los Angeles County Superior Court in 1961. In 1966, she was appointed Associate Justice of the California Court of Appeal. In 1968, she was appointed to the United States Court of Appeals for the Ninth Circuit. She served on that court for eleven years before resigning to accept the position of United States Secretary of Education under then-President James E. Carter. She returned to private practice in 1981. Ms. Hufstedler has served on the board of numerous organizations, including the Institute for Judicial Administration, the American Law Institute, and the Advisory Council for Appellate Justice.

Before his appointment to the federal bench, Nathaniel R. Jones established a distinguished career in the public sector. He served as Executive Director of the Fair Employment Practices Commission, an Assistant United States Attorney for the Northern District of Ohio, and Assistant General Counsel for the Kerner Commission, an independent committee charged with investigating the cause of urban rioting in the 1960s. In 1969, Mr. Jones became General Counsel of the NAACP and in that capacity he argued several cases before this Court, including *Milliken v. Bradley*, 433 U.S. 267 (1977), in which he successfully defended a plan for the desegregation of the Detroit school system. He was nominated to the United States Court of Appeals for the Sixth Circuit in 1979 and he served on that court for twenty-two years until his retirement in 2002.

James K. Logan has enjoyed a career as legal academic, federal appellate judge, and practitioner. After graduating from Harvard Law School in 1955, Mr. Logan became a professor at the University of Kansas School of Law and later served as dean of that school. He also taught at Harvard University, the University of Texas, Stanford University, the University of Michigan, and Duke University. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit and served on that court for twenty-one years. During his time on the court, he chaired the Advisory Committee of the United States Judicial Conference, which was responsible for rewriting the Federal Rules of Appellate Procedure.

Abner J. Mikva attended the University of Chicago School of Law and clerked for the Honorable Sherman Minton, Associate Justice of this Court. Mr. Mikva was elected to the United States Congress in 1969 and served five terms until he resigned in 1979 to accept an appointment to the United States Court of Appeals for the District of Columbia Circuit. He was an appellate judge of that court for fifteen years and Chief Judge for the last four. He resigned from the federal bench in 1994 to serve as White House Counsel for then-President William J. Clinton. He taught law at both Northwestern University and the University of Chicago School of Law and currently is chair of the Illinois Human Rights Commission.

H. Lee Sarokin spent twenty-five years as a trial lawyer until he was appointed to the United States District Court for the District of New Jersey in 1979. He served on that court for fifteen years until 1994 when then-President William J. Clinton appointed him to the United States Court of Appeals for the Third Circuit. Mr. Sarokin authored more than 2000 opinions, acted as a member of the Judicial Conference on Court Administration and Case Management, and twice chaired the National Conference of Federal Judges. He retired from the court in 1996 and is currently a

Distinguished Jurist in Residence at the University of San Diego School of Law.

Patricia M. Wald graduated from Yale Law School in 1951, and clerked for Judge Jerome N. Frank of the United States Court of Appeals for the Second Circuit. She spent ten years as a public interest litigator and served for three years as Assistant Attorney General of the United States for the Office of Legislative Affairs. In 1979, she was appointed to the United States Court of Appeals for the District of Columbia Circuit, where she remained for twenty years and served as Chief Judge from 1986 to 1991. Since retiring from the court, Ms. Wald has represented the United States as a judge of the International Criminal Tribunal for the Former Yugoslavia at The Hague, Netherlands and served as a member of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.

As a result of their long careers as litigators, appellate advocates, and judges, *amici curiae* have participated in, and benefited from, oral argument. Their experience afforded them ample opportunity to witness firsthand the integral role oral argument plays in the appellate decision-making process. *Amici curiae* are uniquely poised to attest to the value oral argument contributes to the appellate process and offer a perspective on the issue not reflected by the parties or other *amici*. *Amici curiae* have an interest in assuring that oral argument and the vital place it holds in the appellate system be preserved as guaranteed by the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Petitioner Stacey Miller asserts that two judges of the Seventh Circuit Court of Appeals violated Federal Rule of Appellate Procedure 34(a)(2) (hereinafter "Rule 34" or "the Rule") when it disposed of his case without oral argument

despite the fact that one judge on the panel would have heard argument. Cert. Pet. p. 9. In violating Rule 34, the panel did not simply deny the litigant an opportunity to be heard. The panel also denied its own member one of an intermediate federal appellate court judge's most valued rights: the right to hear oral argument in those cases in which the judge deems it beneficial. When the two judges directed that there be no oral argument in Petitioner's case over the objection of Judge Kenneth F. Ripple, the two judges compromised the decision-making process of the entire panel. Judges have stressed the valuable role oral argument plays in decision-making: oral argument affords judges the opportunity to supplement the briefs, assess early impressions, interact with counsel, and evaluate the merit of presented issues.

By allowing an intermediate federal appellate judge to insist on oral argument, even when the other two members of a panel would deny it, Rule 34 confers a minority right on each judge. That minority right is analogous to this Court's own procedure for determining which cases it will review. The "Rule of Four" provides for plenary review when four Justices out of nine favor granting a petition for writ of certiorari. This Court recognizes the valuable role oral argument plays in that review, as evidenced by its reluctance to render a decision without the benefit of oral argument.

An exercise of this Court's supervisory power is warranted here in order to protect the minority right granted each judge and preserve the important role oral argument plays in the federal appellate process. Ordinarily a litigant has no way of knowing when a member of his panel has been thusly denied; it is only when a judge takes the initiative to dissent, as happened here, that a violation of Rule 34(a)(2) comes to light. The intermediate federal appellate courts are themselves entrusted with powers of review over the lower courts; it is essential to their legitimacy that they not ignore their own rules.

This Court should grant the instant petition to ensure that the practice of denying oral argument over the objection of a judge of a United States Court of Appeals does not become an accepted practice in violation of the Federal Rules of Appellate Procedure.

ARGUMENT

I. Oral Argument Plays an Integral Role in the Decision-Making Process.

Oral argument plays an integral role in the decision-making process, as judges of the federal appellate courts (including this Court) themselves attest. *See* The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 128 F.R.D. 409, 537 (May 24, 1989) ("I find oral argument very important . . . . I wouldn't change the process for all the tea anywhere. I think oral argument is as vital as the briefs.") (statement of Paul R. Michel, Judge of the Federal Circuit Court of Appeals); Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 36 (1986) ("[O]ral argument is an essential component of the decisionmaking process and plays an important role in assisting the appellate judge in reaching a decision.") (then-Judge of the Eighth Circuit Court of Appeals); Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L. J. 1478, 1484 (1983) ("In the environment of judicial decisionmaking, oral argument is a vital but endangered species.") (then-Judge of the District of Columbia Circuit Court of Appeals). Indeed, Judge Richard A. Posner, Judge of the Seventh Circuit Court of Appeals and a member of the panel below, has praised oral argument as "provid[ing] a period of focused and active judicial consideration of the

case." Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 120 (1985).[3]

The support appellate judges show for oral argument is fitting, as they are its true beneficiaries. Oral argument is a tool of persuasion and the judges are the ones to be persuaded. They are the decision-makers. As the decision-makers, judges have identified several important functions oral argument serves in the decision-making process:

(1) Judges value oral argument as an essential supplement to the parties' briefs.[4] Oral argument "is a time to tie up loose ends, to amplify points made in the briefs, and most important, to answer the judges' questions [formed while reading the briefs] . . . . The briefs often raise questions and misconceptions that a skillful lawyer can answer or assuage during colloquy with the court." Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 187–88 (1997) (Judge of the Ninth Circuit Court

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[3] That Judge Posner can advocate in favor of the very practice that he denied to a fellow member of the panel is testimony of the need for intervention by this Court to ensure that the right of a single judge to compel oral argument is protected against the will of the majority. Letting one judge place a case on the argument calendar may not be the most efficient use of judicial resources, but efficiency is not the way of Rule 34 or of process-oriented minority rights. Due process is not an interest grounded in economic determinism.

[4] Indeed, this appears to be a primary reason Judge Ripple called for oral argument:

> In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue [adopted by the panel] . . . be said to be totally responsive to the presentation of the appellant in this court. . . .
>
> Accordingly, I respectfully dissent . . . [and] would set this case for oral argument in due course."

Cert. Pet. App. 18a.

of Appeals). Speaking during a panel discussion on oral argument in 1983, Justice William H. Rehnquist stated: "You could write hundreds of pages of briefs, and . . . still never [be] absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. [At argument,] you know that you do have an opportunity to engage or get into the judge's mental process." Bright, *supra*, at 36–37.

(2) Judges value oral argument as an opportunity to assess their early impressions. Judge Michel referred to oral argument as "a chance to test our thinking." 128 F.R.D. at 535. Then-Judge Bright echoed this sentiment, stating: "The argument gives the court . . . an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result." Bright, *supra*, at 38. Then-Professor of Law Wade H. McCree, Jr., former Judge of the Sixth Circuit Court of Appeals and former Solicitor General of the United States, wrote: "My experience . . . leads me to believe that oral argument . . . is often useful for both the bench and bar . . . . Cases that clearly seem predestined . . . to affirmance without opinion . . . sometimes seem less predestined after oral argument." Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 790 (1981) (internal quotation marks omitted).[5]

(3) Judges value the personal interaction oral argument affords. Oral argument "enables counsel to add the stress and verbal emphasis that cannot be easily communicated on the cold page of the printed brief. [It] is counsel's opportunity to persuade, to turn the heads of the judges a little, to leave them with the working hypothesis

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[5] The use of the word "predestined" is particularly apt in evaluating the reasoning behind a rule that orders oral argument when one member of the panel calls for it, even in the face of two other members who may have made up their minds based on the briefs.

that his client deserves to win." Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1977) (Chief Judge of the Second Circuit Court of Appeals). Justice John M. Harlan once remarked: "[Oral argument] gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute . . . for the Socratic method of procedure in getting at the real heart of an issue and finding out where the truth lies." Commission on the Revision of the Federal Court Appellate System, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 66–67 (1975) [hereinafter "Hruska Commission Report"].

(4) Similarly, judges value oral argument as an opportunity to identify and evaluate the issues raised by a case. Advocating for the preservation of oral argument, then-Judge Wald stated: "Seemingly inauspicious cases can blossom into consequential ones through probing interrogation . . . . Pointed inquiry can identify areas where the law is clear or muddled, where the case may be disposed of summarily or may require more lengthy treatment." Wald, *supra*, at 1484. This was Judge J. Clifford Wallace's point when he dissented to the majority's decision not to hear oral argument in *Gravatt v. Paul Revere Life Ins. Co.*: "In our rush to limit our time on the bench, a party may have suffered a reversal when twenty minutes of oral argument could have satisfied a majority that this outcome is unwarranted." No. 02-17028, 2004 WL 1257716, at *6 (9th Cir. 2004).

(5) The above factors together are accorded further significance by the way they can interact to influence votes. Eighty percent of judges agree that oral argument is important to the resolution of cases. Bright, *supra*, at 39. In response to the question whether oral argument has "actually changed [his] mind," Judge Michel responded that it had "many times." 128 F.R.D. at 536–37. And speaking in 1972 at the Third Judicial Conference, Justice William J. Brennan

remarked: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument not to be terribly concerned for myself were I to be denied oral argument." Hruska Commission Report, *supra*, at 66.[6]

II. Rule 34(a)(2) Grants a Minority Right to Each Judge.

The unanimity requirement of Rule 34(a)(2) vests in each member of the panel a minority right to hear oral argument. One judge may insist that argument be held, and that decision of one judge binds the other two. The creation of a minority right underscores the importance of oral argument; to strip a judge of that right removes an important feature of the appellate process.

This Court's procedure for determining which cases to review also embodies the right of a minority of Justices. The "Rule of Four," an uncodified but a longstanding practice, calls for plenary review of a case when four Justices favor granting the petition. Robert L. Stern et al., SUPREME COURT PRACTICE 296 (8th ed. 2002); *see also United States v. Shannon*, 342 U.S. 288, 298 (1952) (Brennan, J., dissenting) ("By long practice—announced to the Congress and well known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari."). The Justices follow the same Rule of Four to determine briefing and oral argument of an appeal. Stern, *supra*, at 296. By virtue of the Rule of Four, a minority is able to control the

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[6] Even if oral argument never changed the mind of a single member of the judiciary, it is still protected by Rule 34 as a right of the litigants, lawyers, and judges. As such, the judges of the United States Courts of Appeals are obliged to respect the judgment of the adoptive authorities against any inconveniences that might occur as a result of rules enforcement. *See* Cert. Pet. p. 11 (discussing the policy considerations that influenced the adoption of Rule 34(a)(2)).

Court's argument docket. The Rule of Four is thus a cognate of Rule 34.

Further, the decision to grant certiorari often results in oral argument. Stern, *supra*, at 673 ("[W]here the petition for certiorari is granted . . . further briefing and oral argument are expected by the Court."). The Court has both denied parties' requests to submit on briefs, *see Franchise Tax Bd. v. Alcan Aluminum, Ltd.*, 493 U.S. 930 (1989), and appointed counsel to present argument when one is not available, *see Mathews v. Weber*, 423 U.S. 261 (1976). Indeed, former Supreme Court Rule 38.1 explicitly stated that the Court is "reluctant to accept the submission of briefs, without oral argument, of any case in which . . . certiorari has been granted." Stern, *supra*, at 673. Thus, this very Court utilizes a procedure in which the vote of a minority determines whether a litigant's case will, literally, be "heard."

Just as the Rule of Four promotes essential oral communication between this Court and the Bar, even when less than a majority requests it, so Rule 34(a)(2) promotes essential oral communication between judges of the appellate courts and the Bar, even when less than a majority requests it. The plain words of Rule 34(a)(2) must be followed to preserve this right, "highly valued" among judges. Joe S. Cecil & Donna Stienstra, Fed. Judicial Ctr., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS, at § VII.D (1987).

III. This Court Should Exercise Its Supervisory Power to Prevent Further Violation of Rule 34(a)(2).

Supreme Court Rule 10(a) states that this Court will, in its discretion, grant certiorari when "a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." A violation of

Rule 34(a)(2) is the type of departure that this Court has been granted the supervisory power to correct.

Where lower federal courts fail to correctly apply rules of procedure, this Court has provided guidance. *See McCarthy v. United States*, 394 U.S. 459, 463–64 (1969) (granting certiorari to review an appellate court's decision affirming a conviction based on a guilty plea that had been entered in the district court in violation of Rule 11 of the Federal Rules of Criminal Procedure); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (granting certiorari to review lower courts' construction of Rule 35 of the Federal Rules of Civil Procedure); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (granting certiorari to clarify the relationship between the discovery rules of the Federal Rules of Civil Procedure and attorney work product).

A violation of Rule 34 particularly compels an exercise of this Court's supervisory power, because of the nature of the Rule's operation as a dictate of operating practice. There is no telling with certainty the number of times that Rule 34(a)(2) has been violated because the Rule does not require a vote open to public scrutiny. As a result, violations are only exposed through the rare circumstance of a judge's written dissent, as occurred here. Also, it is especially important that the intermediate federal appellate courts, judicial bodies that themselves are entrusted with the power of review over lower courts, not be seen to ignore their own rules, thereby undermining their legitimacy when dispensing justice.[7]

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[7] In a recent article warning that mounting criticism of an "activist judiciary" threatens judicial independence, Justice Sandra Day O'Connor (Retired) wrote:

> An independent judiciary does not mean . . . that it is somehow improper to criticize judicial decisions . . . . Judges can—and do—sometimes render erroneous decisions, but that is why appeals are allowed to higher courts . . . . Members of the judiciary cannot

This Court should act in this case in order to secure for judges and litigants alike the benefits of oral argument upon the demand of any judge of the United States Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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> sincerely believe that they should be regarded as above the very laws they are charged with interpreting. Ours is, after all, a nation of laws[.]

Sandra Day O'Connor, *The Threat to Judicial Independence*, Wall St. J., Sept. 27, 2006, at A18.